Supreme Court, U.S.
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No. 93-2067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEWAN WHITE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

RASHAUN B. LAWRENCE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Did the Illinois Supreme Court correctly conclude that the legislature did not intentionally discriminate on the basis of race when enacting a law subjecting young adults to criminal court procedures and sanctions for distributing narcotics on or near public housing property.

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OPINIONS BELOW

Petitioner seeks review of a judgment of the Supreme Court of Illinois in the above cause.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Illinois was entered on March 24, 1994. Petitioner invokes this Court's jurisdiction to review the propriety of the state court order pursuant to 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amendment XIV, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

On January 20, 1992, Dewan White delivered to an undercover police officer a substance containing less than one gram of cocaine. The delivery occurred on a public way at 756 E. 38th Street in Chicago. (1 White CLR, pp. 3, 5). That location is within 1000 feet of property owned, operated and managed by the Chicago Housing Authority.

On January 28, 1992, Dewan White delivered to an undercover police officer a substance containing less than one gram of cocaine. The delivery occurred on a public way at 746 E. 38th Street in Chicago. (1 White CLR, p. 4). That location is also within 1000 feet of property owned, operated and managed by the Chicago Housing Authority.

White was charged with two counts of delivering a controlled substance on a public way within 1000 feet of real property owned, operated and managed by a public housing authority in violation of 720 ILCS 570/401(c) and 570/407(b)(2). (1 White CLR, pp. 3-4). White was 16 years old at the time of the incident and resided at 706 E. 38th Street in Chicago. (1 White CLR, p. 7).

On December 22, 1991, a police officer observed Rashaun Lawrence in a vacant apartment with a clear bag containing numerous smaller green bags believed to contain cocaine. The apartment was located at 527 E. Browning in Chicago, property owned, operated and managed by the Chicago Housing Authority and commonly known as the Ida B. Wells community. The officer approached Lawrence and retrieved the clear plastic bag. Lawrence was searched and another similar clear plastic bag was found in his pocket. The two clear bags contained 68 green plastic bags containing white rocks suspected to be cocaine. The bags contained over 23 grams of cocaine. Lawrence also had $308.00 in his possession. (1 Lawrence CLR, pp. 5-9).

Lawrence was charged with possession with intent to deliver a controlled substance on property owned, operated and managed by a public housing authority, a violation of 720 ILCS 570/401(a)(1)(A). Lawrence was also charged with criminal trespass to state supported land in violation of 720 ILCS 5/21-5(a). (1 Lawrence CLR, p. 6). Lawrence was 16 years of age at the time of the offense and resided at 525 E. 37th Street in Chicago, Illinois. (1 Lawrence CLR, pp. 25-28).

Pursuant to 705 ILCS 405/5-4(7)(a), the juvenile code is inapplicable to juveniles 15 or 16 years of age who are charged with violating certain narcotics offenses on or near public housing property. Juveniles charged with these offenses must be tried and sentenced under the criminal code. Because the juvenile and criminal codes are applied by separate courts in Cook County, the public housing exemption to the juvenile code has been characterized by its procedural effect as a statute requiring the "automatic transfer" of the juvenile. *People v. P.H.*, 582 N.E.2d 700, 705-06 (Ill. 1991).

The defendants filed motions with the court challenging the constitutionality of the automatic transfer statute on several grounds. Ruling on the motions in both cases, the Circuit Court held that application of the criminal code to juveniles accused of possession with intent to deliver controlled substances on or within 1000 feet of property owned, operated and managed by a public housing agency violated the equal protection provisions of the state and federal constitutions. (Op. at 6; 1 Lawrence CLR, p. 51, 1 White CLR, p. 38).

The court opined that application of the law had not resulted in the prosecution under the criminal code of any white juvenile offenders in Chicago. The court stated, "It is extremely unlikely that [the] Automatic Juvenile Transfer for public housing violations will ever affect any white 15 or 16 year olds from Sauganash, Bridgeport, or Arlington Heights. Fifteen and 16 year olds from white, middle class neighborhoods will be subject to neither Automatic Transfer, nor enhanced penalties." (Op. at 4; 1 Lawrence CLR, p. 49, 1 White CLR, p. 36). The court stated further, "[t]his Court concludes that the clear statistical data from the Chicago Housing Authority, considering the fact that the Automatic Transfer Statute has resulted in the actual transfer of only people of color, when coupled with the legislative colloquy indicates a discriminatory result; if not also discriminatory purposes and intent." (Op. at 6; 1 Lawrence CLR., p. 51; 1 White CLR, p. 79). Therefore, the court concluded that the law violated the equal protection constitutional provisions.

The People filed notices of substantial impairment and sought review of the court's decision. (1 Lawrence CLR, pp. 52-57; 1 White CLR, pp. 80-85).

The Supreme Court of Illinois reversed, finding several fatal flaws in defendants' numerical information and in the

reasoning supporting the trial court opinion. Specifically, the court found that defendants failed to present any information that could constitute proof of discrimination on the part of the legislature in enacting the statute, a necessary component of defendants' constitutional claim.

REASONS FOR DENYING THE WRIT

Defendants attempt to characterize this case as some kind of significant opportunity to rewrite equal protection constitutional law as it relates to criminal statutes. The Court should deny the writ because this case presents no such opportunity. Defendants' case is simply another attempt to use the Court to change a legislative policy with which counsel for the defendants disagree, in this case the practice of trying young adults under the criminal code.

Defendants' case is premised upon what they call "compelling statistical evidence." Defendants' so-called "compelling statistical evidence", however, fails to support any of the conclusions for which they offer it. Simply put, defendants' numbers are meaningless. The well-settled legal principles regarding the Equal Protection Clause of the Constitution were applied correctly by the Illinois Supreme Court to the very weak facts of this case.

A. DEFENDANTS OVERSTATE THE SIGNIFICANCE OF THEIR SO-CALLED STATISTICAL EVIDENCE.

Defendants contend that their case is premised on "compelling statistical evidence." From this compelling statistical evidence, defendants wish the Court to infer that the Illinois General Assembly intended to discriminate against African Americans when it enacted the statute

under which they have been prosecuted.[1] A close examination of this "compelling statistical evidence", however, reveals that it is neither compelling, nor statistical, nor evidence of anything.

Defendants' "statistical evidence" consists of two items: (1) a list of names and the race of the 34 persons charged in Chicago under the statute as adults from August, 1991 to July, 1992; and (2) a recitation of the racial composition of Chicago Housing Authority residents. That is all they offer.

These "statistics" prove nothing in this case.

The Illinois Supreme Court was not impressed with defendants' "compelling statistical evidence." The defendants

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[1] Defendants do not allege that they were discriminated against by the police, or the prosecutors, or the judges, or the sentencing commission, or the parole board, as is more typical in these types of cases. Generally, defendants in these cases allege that the statute was enforced in a discriminatory manner, and that they were individually victimized by that discriminatory enforcement. *See e.g., Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983). Defendants make no such allegation in this case. In *Facion v. State*, 627 So. 2d 1144 (Ala. App. 1993), in response to a claim that Alabama's public housing enhancement statute's application to him violated his equal protection rights, an Alabama appellate court stated:

> This court has previously held that, although no clear standards for quantum or type of proof sufficient to illustrate discriminatory enforcement of a statute . . . , three elements must generally be proved: selectivity in enforcement, selectivity that is intentional; and selectivity based upon some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. It is insufficient merely to show that other violators have not been prosecuted, that there has been laxity in enforcement, or that there has been conscious exercise of some selectivity in enforcement.

Id. (quoting, *De Shazo v. Huntsville*, 416 So.2d 1100, 1103 (Ala. Cr. App. 1982). The court rejected the defendant's arguments.

continue to represent that these numbers unquestionably prove disparate impact. No one else shares that conclusion. While the state court dismissed the challenge because the defendants did not come close to proving any intentional discrimination, the court did not conclude that the defendants had proven disparate impact. The state court simply disposed of defendants' weak case on its most obvious and glaring defect. Defendants' statistics prove nothing relevant to their charge because (1) they relate only to Chicago while the statute has statewide applicability and public housing developments exist throughout Illinois; (2) they fail to prove or suggest that the statute is the cause of any disparate effect; and (3) they falsely assume that the only people who commit crimes near public housing developments are residents.

First, the statute challenged is a statewide statute while the numerical information offered by defendants regards only part of the state to which this statute applies.

The defendants' list of individuals subjected to the statute over a 12-month period were culled from the records of the Cook County Circuit Court Criminal Division. These records do not reflect the use of this statute in suburban Cook County or the rest of Illinois. Defendants' statements that these were the only persons subject to the statute during the 12 month period are unsupported. The defendants have absolutely no idea regarding this statute's use outside of Chicago.

Defendants' information on public housing units falsely assumes that public housing developments do not exist outside of Chicago. Respondents and the Chicago Housing Authority, in an amicus brief, offered information to the Illinois Supreme Court which showed that of the 82,770 public housing dwelling units in Illinois, only 42,510 units

were in Chicago. In addition, the information presented demonstrated that the racial composition of public housing statewide was quite different than the racial composition of Chicago Housing Authority residents.[2]

The statute is a statewide statute. The statute applies to public housing developments throughout Illinois. As the bill's sponsor noted during debate in the Illinois House of Representatives, "not only does [the law] include CHA, it includes *any* public [housing] facilities." (86 General Assembly, June 15, 1989, p. 153, Illinois Senate Bill 1270) (emphasis added). If the legislature intended to limit the applicability of the statute to Chicago or Cook County, it could, as it has, with court approval, on numerous occasions. *See e.g., Fried v. Danaher*, 263 N.E.2d 820 (Ill. 1970) (*citing Hunt v. Rosenbaum Grain Corp.*, 189 N.E. 907 (Ill. 1934)); *Hamer v. Bd. of Educ.*, 265 N.E.2d 616 (Ill. 1970); *Mlade v. Finley*, 445 N.E.2d 1240 (Ill. App. 1983). Clearly, defendants' numerical data is faulty because it attempts to condemn a statewide statute with its alleged effect on only one corner of the state.

Second, these "statistics" fail to suggest or infer that the statute is the cause of any alleged disproportionate impact.

Countless experts have struggled with the issue of overrepresentation of minorities in our criminal justice system and no reasonable person would conclude that this problem is the result of intentional discrimination by the legislature. Defendants' analysis does not include whether any

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[2] Defendants did not believe the court should consider this information and filed motions to strike it from the State and amicus briefs. The court granted the motion to strike because it did not need the information to find fault with defendants' case.

young caucasian adults have been charged with the same narcotics offenses in delinquency petitions.

Defendants attempt to use the complexity of the issue regarding the relationship between race and involvement in the criminal justice system to invite the Court to create an easier threshold for defendants to challenge criminal statutes. No test, however, can bridge the chasm between the numbers they masquerade as statistics and their conclusions. The complexity of the issue of overrepresentation is not addressed whatsoever by the simple figures recited by defendants. "The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables." *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. 1982). *See Knight v. Dugger*, 863 F.2d 705, 743 (11th Cir. 1988) (stating, "generalized studies might never be sufficient to show specific intent. Rather, these studies have 'little hope of excluding every possible factor that might make a difference between crimes and defendant, exclusive of race' ").

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court insisted that the relationship between the statistics and the decision to which the statistics attack be strong and meaningful. *Id.* at 294-99 and n.13-n.21. This Court has specifically rejected proposed inferences from statistical information as indicative of the ill motives alleged by the plaintiffs in many cases. *See e.g., McCleskey*, 481 U.S. 279 (1987); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Defendants simple figures do not begin to address or identify the source of any problem they may have identified.

Third, and finally, the "statistics" assume that the statute applies to persons who live in public housing—which is incorrect. The statute concerns only the place where the offense occurs. These statistics are used to disguise

an argument rejected soundly by the Illinois Supreme Court in an earlier case: the statute does not care where a person lives, but where he or she commits a crime. The Illinois Supreme Court stated:

> We initially note that defendant misperceives the nature of the classification created by section 407(b) of the Act. Defendant contends that section 407(b) punishes offenders who live in public housing more severely than those who can afford to live in non-public housing. Thus, defendant reasons, the classification is based on a defendant's ability to live in non-public housing and not on his or her own conduct.
>
> However, a cursory reading of section 407(b) shows that the residence and wealth of a drug offender are simply irrelevant to the offender's susceptibility to prosecution under section 407(b). The statute does not regard where a drug offender lives; it regards only where a drug offense occurs.

People v. Shephard, 605 N.E.2d 518, 523 (Ill. 1992). When the legislature has specifically stated and drafted a law that deems the residence of the offender irrelevant, statistics about the residents of public housing are not meaningful. Defendants simply say that 15 and 16 year olds are more likely to commit crimes where they live. Defendants have offered no support for this statement other than it being their opinion.[3]

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[3] It should also be noted that defendants were not residents of the public housing buildings in which they allegedly distributed narcotics. Defendant White resided at 706 E. 38th Street in Chicago, while the alleged offense occurred on a public way at 756 E. 38th Street in Chicago. (1 White CLR, pp. 3, 5, 7). Defendant Lawrence resided at 525 E. 37th Street in Chicago, Illinois, while his alleged offense occurred at 527 E. Browning in Chicago. (1 Lawrence CLR, pp. 5-9, 25-28).

Defendants' "compelling statistical evidence" is a sham. All of the reasons they offer to support their petition for a writ are premised on the alleged unique opportunity this case offers the Court because of its sound factual base. Their description of their case and record to not conform to the facts.

B. THE SUPREME COURT OF ILLINOIS CORRECTLY APPLIED WELL-SETTLED LAW TO DEFENDANTS' FACTUALLY WEAK CASE.

The Illinois Supreme Court correctly applied well-settled law to the unremarkable facts of this case.

The court's analysis "[began] with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (quoting, *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). As defendants admit, they must prove that they were not only the victims of discrimination, but that such discrimination was intentional. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 264-65; *see also, Knight v. Dugger*, 863 F.2d 705, 743 (11th Cir. 1988) (stating, "intent, purpose and motive to discriminate racially must be shown").[4]

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[4] Defendants wish for the Court to infer discriminatory intent by the General Assembly based upon their selective recitation of statements from the law's opponents during the legislative debate. The statements of the laws supporters are far more indicative of

(Footnote continued on following page)

Defendants, as correctly stated by the Illinois Supreme Court, failed to prove with their "compelling statistical evidence" even a prima facia case of discrimination against the General Assembly. This Court has long recognized the limited utility of statistics to create an inference of discrimination, but it has also cautioned about the danger of their use to invalidate a race neutral legislative act. In *Washington v. Davis*, 426 U.S. 229 (1976), a case upon which defendants heavily relied, the Court warned against accepting at face value information like that proffered by defendants. The Court stated:

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[4] *continued*

the General Assembly's intent. For example, Representative Thomas Homer (D-Fulton) stated:

> [The bill] extends that concept to those *residential public housing projects in the state*, to recognizing that there are special inherent problems that have arisen in those facilities and has caused many, many moments of agony for parents who do not feel that they can send their children outside the halls of their own residence, secure in the knowledge that those children won't be preyed upon by the dope dealers and those who use firearms to violate the law. This Bill is a victim's rights Bill. It looks to the victims. It tries to protect residents of public housing projects, who have been particularly vulnerable to the crimes preyed upon them by this criminal element.

(86 General Assembly, June 15, 1989, pp. 154-55, Illinois Senate Bill 1270) (emphasis added). State Representative Jesse White (D-Chicago) stated:

> . . . I stand in support of this wonderful piece of legislation. I have a housing development in my district called Cabrini Green, and the people there are sick and tired of being shot at, drugs being sold out in the open, and they think that . . . special attention should be given to this matter, in that they want to live in peace and harmony with their neighbors and friends.

(86 General Assembly, June 15, 1989, p. 160, Illinois Senate Bill 1270).

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Washington, 426 U.S. at 248; *see also Mobile v. Bolden*, 446 U.S. 55, 133 (1980) (Marshall, J., dissenting) (same); *Washington*, 426 U.S. at 248 n.15.

Like the accusers in *McCleskey*, *Washington* and *Arlington Heights*, the accusers in this case, the defendants, have "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor" in the General Assembly's decision to enact this statute.[5] *Arlington Heights*, 429 U.S. at 270. *See also*, *Washington v. Seattle School Dist.*, 458 U.S. 457, 485 (1982) (cautioning against using statistics to challenge "legislation intended

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[5] Before the Illinois Supreme Court, defendants' contended that the information they have set forth is more indicative of discrimination than the information set forth in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The indications of the statistics offered by defendants do not approach the relevance and persuasiveness of the statistics offered in these two cases. In *Gomillion*, the state legislature altered the boundaries of a particular city "from a square to an uncouth twenty-eight-sided figure" to exclude black voters. *Gomillion*, 364 U.S. at 340. In *Yick Wo*, a city passed an ordinance prohibiting 310 laundries housed in wooden buildings from operating without a permit. When the laundry owners applied for permits, all but one of the white applicants received permits while all of the over 200 Chinese applicants were denied permits. *Yick Wo*, 118 U.S. at 373. *See*, *McCleskey*, 481 U.S. at 293 n.12. As the Illinois Supreme Court stated politely, defendants' numerical information is really indicative of nothing.

to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented"); *Washington*, 426 U.S. at 255 (Stevens, J. concurring) (stating, "[t]hat evidence, without more, is not sufficient to overcome the presumption that a test which is widely used by the Federal Government is in fact neutral in its effect as well as its 'purpose' as that term is used in constitutional adjudication").

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

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